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No. 589

In the Supreme Court of the United States

OCTOBER TERM, 1968

JESUS ROLON MARXUACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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After a jury trial in the United States District Court for the District of Puerto Rico, petitioner was convicted on three counts charging violations of the federal narcotics laws. On October 13, 1967, he was sentenced to imprisonment for concurrent terms of twenty years and fined $20,000. The court of appeals affirmed (Pet. App. A).

1. As part of intensive undercover operations against Puerto Rican narcotics traffic during the spring

of 1967, Estoban Mendoza, an informant, arranged to purchase 125 grams (about one quarter pound) of heroin from Miguel Soto-Ayala (R. 355).[1] On March 28, the two met in San Juan and went to a local hotel, where petitioner joined them (R. 241-247). Mendoza gave petitioner $4500; petitioner counted the money and gave his car keys to Soto-Ayala, who then went to petitioner's car, removed a white package from its trunk, returned, and gave the package to Mendoza (*Ibid.*, R. 329-333). Later, Mendoza gave the package to a government agent, Jorge, who had witnessed the transfer; analysis showed that it contained 125 grams of heroin (R. 368).

Petitioner and Soto-Ayala were among those arrested at the close of the undercover operations. Together with defendants in other cases resulting from these operations, they retained the services of Cesar Andreu Rebas, an experienced criminal lawyer who previously had been successful in defending petitioner against a homicide charge (R. 74-75, 132, 139). Mr. Andreu was later joined as counsel of record for the two by Benicio Sanchez Castano; Mr. Sanchez then assumed the primary responsibility for petitioner's defense, while Mr. Andreu concentrated on Soto-Ayala. The two cases were severed for trial.

Trials in the cases resulting from the undercover operations were being held in the late summer and early fall of 1967. Apparently as a result of incidents in other cases as well as the present ones, the trial

[1] "R." refers to the three-volume record of the proceedings in the district court, including the transcripts of the trial and pretrial hearings, filed with the Clerk of this Court.

judge came to believe that counsel were seeking to delay trial when, after several earlier postponements in connection with pre-trial motions,[2] a motion for continuance was filed shortly before the day set for trial, Oct. 2. On Oct. 2, he denied the motion and directed that a jury be empaneled the following day.

By the time court convened the next morning, Soto-Ayala was in a hospital claiming symptoms of appendicitis, which laboratory tests and an operation subsequently performed out of an abundance of caution showed he did not have (R. 194-205), and an explosive device had been found attached to agent Jorge's car (R. 24-30). Alleging the bombing attempt and threats made by petitioner against Jorge after it had become known that the latter would be a witness against him, the government moved for revocation of petitioner's release on bail. The court asked defense counsel if they knew of the bombing incident. Mr. Sanchez, who had a heart condition, became highly upset, and the following colloquy occurred:

> THE COURT: I want to say here among ourselves, for some reason or other, Mr. Sanchez, you and Mr. Andreu take personal offense when certainly none is intended. I have not sought to offend either one of you. I have only sought to do what I conceive to be my duty. I am not in any way implying that either of you are involved in any schemes or conspiracy or the like. I am only reciting the record, that is all, and if you have considered that somehow or other I have implied

[2] The chronology of pretrial continuances may be found in the opinion of the court of appeals, Pet. App. 2a.

that you are involved in anything to the contrary, please be assured that I do not do it, and I will not do it until I am presented with evidence supporting such a thought.

But I must say that what I have said about the continuous efforts to procure a later trial or a continuance or a postponement of the trial stands as stated, and whatever implications may arise from that, just arise.

I think you should not just immediately assume in each instance, as you did here a few minutes ago, that somehow or other I was impugning your integrity. All I said a few minutes ago was, "Do you have any knowledge of these circumstances?"

MR. ANDREU: How could we have knowledge of these things, Your Honor, without being in the conspiracy.

THE COURT: It would be possible that you heard about this threat against Jorge. [R. 14-15.]

Empaneling of the jury was then deferred on Mr. Sanchez's representation that he had to see his doctor, but could return by afternoon, and the remainder of the morning was devoted to a hearing on the motion to revoke bail [3] and an inquiry into the whereabouts of Soto-Ayala, at that time unknown.

Mr. Sanchez proved unable to return, as attested by

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[3] The motion was denied, but petitioner was firmly warned to be present the following day. He did not appear and was eventually found at a hospital claiming "chest pains"; hospital officials informed the court that he was neither ill nor incapable of having informed the court of his whereabouts, and the court ordered him taken into custody (R. 183 *ff.*, 216).

his doctor's certificate;[4] Mr. Andreu requested a continuance, on the grounds that he had not practiced in federal court for several years, that he had difficulties with English, and that Mr. Sanchez had been retained by petitioner to represent him during the empaneling of the jury and trial (R. 72). The court refused the continuance[5] and directed Mr. Andreu to represent petitioner, which he did over the latter's objection. Mr. Andreu appears to have had petitioner's full cooperation and assistance throughout (R. 126, 580), and, the judge remarked (R. 593-594), gave him a vigorous and thorough defense.

2. All of petitioner's claims relate to the court's action in designating Mr. Andreu as his counsel and Mr. Andreu's conduct of his defense. As the court below properly held, these claims must be adjudged in the very unusual factual situation of this case; as such, they present no issues of general importance meriting this Court's consideration.

In particular, the court's action must be judged against the background of an apparent attempt on the life of a crucial government witness (suggesting sound reason for expeditious hearing of the case), previous and contemporaneous efforts by petitioner and his codefendant to delay the trial as long as possible, and the fact that Mr. Andreu had been petitioner's designated counsel of record from the time of arrest. As the court below stated, "at this stage of the

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[4] As did the court below, the government concedes that Mr. Sanchez was not falsifying as to his knowledge of the attempted bombing or his physical condition.

[5] In fact, for various reasons the trial itself did not begin until October 6.

proceedings, a continuance was not due simply as a courtesy to Mr. Sanchez" (Pet. 3a-4a); there were here both sound reasons for prompt hearing of the case and ample grounds for assurance that counsel would be familiar with the case, and not personally objectionable to petitioner.

The right of representation by counsel of one's own choice assumes the defendant's good faith; it carries the reasonable condition that it cannot be asserted so as to obstruct the orderly procedure of the courts or to interfere with the fair administration of justice. *United States* v. *Bentvena*, 319 F.2d 916 (C.A. 2), certiorari denied *sub nom. Mirra* v. *United States*, 375 U.S. 940. A trial judge confronted with a defendant who has obtained numerous delays and has constantly employed dilatory tactics must, in the exercise of sound discretion, "do what is reasonably necessary to meet the situation." *United States* v. *Bentvena, supra*, at 936. This may sometimes require appointment of counsel against the wishes of a non-indigent defendant. *United States* v. *Abbamonte*, 348 F.2d 700 (C.A. 2), certiorari denied, 382 U.S. 982; *United States* v. *Dardi*, 330 F.2d 316, 335 (C.A. 2), certiorari denied, 379 U.S. 845.

Mr. Andreu suffered no incapacity which made his appointment, in particular, erroneous. He was an experienced criminal lawyer, already familiar with the case through his participation as counsel. His claim to difficulties with English, disbelieved by the judge (R. 72-73), is belied by the transcript. His claimed unfamiliarity with the Federal Rules of Criminal Procedure could readily have been remedied, as pointed

out by the court below, and is cast in some doubt by his representation of Soto-Ayala and his participation in earlier defense motions under those Rules. Although Mr. Andreu failed to demand production of the written statements of the government witnesses, or to move for a judgment of acquittal at the close of testimony, these omissions hardly demonstrate ineffectiveness. There clearly was enough evidence to make guilt or innocence a jury question, so that counsel might have decided, as a matter of strategy, not to delay matters further with frivolous acts. With regard to the lack of motions pursuant to 18 U.S.C. 3500 for the production of statements made by agents, it is apparent that the attorney made no request for the statements because he already had them (R. 369).[6] Thus, petitioner has failed to show incompetence or possible prejudice in the only respects in which he claims either.

Finally, there is no basis for the objection—never made at trial,[7] but still carefully reviewed by the court of appeals (Pet. 5a-6a)—that there was a con-

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[6] Mr. Andreu had extensive experience in the Puerto Rican courts, where the right to demand production of the statements of government witnesses had been recognized since 1961. *People* v. *Ribas*, 83 P.R.R. 371.

[7] See *Glasser* v. *United States*, 315 U.S. 60, 76. Not only did Mr. Andreu fail to object to his appointment on conflict of interest grounds, but when the court subsequently appointed additional counsel for Soto-Ayala, in advance of Soto-Ayala's testimony (R. 323-325), this counsel also failed to object. The additional counsel had been appointed, not because of possible conflict, but to ease the burden on Mr. Andreu, who was to defend Soto-Ayala and another alleged narcotics offender in their trials shortly after the conclusion of petitioner's.

flict of interest between petitioner and Soto-Ayala which should have precluded Mr. Andreu, petitioner's counsel of record since arrest, from representing petitioner at trial. Petitioner's defense was that he was not in Puerto Rico at the time of the alleged transaction, but was in New York City. Soto-Ayala, who testified for petitioner, stated that he saw petitioner in Puerto Rico on March 26 and April 1 (R. 492, 503) but not on March 28, the date he met with Mendoza. His purpose in meeting Mendoza, he alleged, was to receive repayment of a loan (R. 438), and he denied selling any heroin to Mendoza (R. 452). Nothing Soto-Ayala said in any way implicated petitioner. For this reason the defense had intended to use him as a witness even before Mr. Sanchez became ill (R. 6, 73-74, 131).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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